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In The

Supreme Court of the United States

BARBARA HAFTERSON and
MATTHEW W. HAFTERSON,
as Personal Representatives of the
Estate of NATHAN NICHOLAS HAFTERSON, deceased,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

SEAN B. CRONIN
CRONIN & MAXWELL
2223 Oak Street
Jacksonville, Florida 32204
(904) 388-9555
sean@croninmaxwell.com

BRYAN S. GOWDY
Counsel of Record
MILLS CREED & GOWDY, P.A.
865 May Street
Jacksonville, Florida 32204
(904) 350-0075
bgowdy@appellate-firm.com

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether *Feres v. United States*, 340 U.S. 135 (1950) – a decision that prohibited service members from recovering under the Federal Tort Claims Act for injuries incident to their military service – should be overruled.[1]

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[1] A nearly identical question appears to have been presented in *Matthew v. Department of Army*, No. 08-1451. The Court requested from the Government a response, which the Government filed on August 7, 2009. Brief for Resp. in Opposition to Pet. for Cert., *Matthew v. Dep't of Army*, No. 08-1451, 2009 WL 2419167, at *10 (Aug. 7, 2009).

LIST OF PARTIES IN PROCEEDING BELOW

All parties to the proceeding are listed on the cover of the brief.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties in Proceeding Below	ii
Table of Contents	iii
Table of Authorities	v
Opinions Below	1
Jurisdiction	1
Constitutional Provisions and Statutes Involved	1
Statement of the Case	2
I. The FTCA and the *Feres* Doctrine	2
II. The Case Below	3
Reasons for Granting the Writ	4
I. *Feres* was wrongly decided and has been widely criticized	4
II. *Feres* is unconstitutional because it violates the separation-of-powers doctrine	8
III. This Court should reexamine and overrule *Feres*, notwithstanding principles of *stare decisis*	12
Conclusion	16

TABLE OF CONTENTS – Continued

Page

APPENDICES

Opinion of the United States Court of Appeals for the Eleventh Circuit ..... App. 1

Order of the United States District Court, Middle District of Florida, granting the United States' Motion to Dismiss ..... App. 5

Judgment in a Civil Case of the United States District Court, Middle District of Florida ..... App. 11

28 U.S.C. § 1346 ..... App. 13

28 U.S.C. § 2680 ..... App. 13

TABLE OF AUTHORITIES

Page

CASES

Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1932) 12, 13

City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) 10

Clinton v. City of New York, 524 U.S. 417 (1998) 12

Costo v. United States, 248 F.3d 863 (9th Cir. 2001) 11, 14

Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1940) 7, 13, 15

FCC v. Beach Commc'ns, Inc., 508 U.S. 307 (1993) 11

Feres v. United States, 340 U.S. 135 (1950) ..... *passim*

Holder v. Hall, 512 U.S. 874 (1994) 15

I.N.S. v. Ventura, 537 U.S. 12 (2002) 11

James v. United States, 366 U.S. 213 (1961) 14

John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 128 S. Ct. 750 (2008) 12

Johnson v. Transp. Agency, Santa Clara County, Cal., 480 U.S. 616 (1987) 15

Johnson v. United States, 481 U.S. 681 (1987) 4, 5, 6

Lombard v. United States, 690 F.2d 215 (D.C. Cir. 1982) 6

Matreale v. State Dep't of Military & VA, 487 F.3d 150 (3d Cir. 2007) 6

TABLE OF AUTHORITIES – Continued

Page

Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991) 11

N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) 11

Pearson v. Callahan, ___ U.S. ___, 129 S. Ct. 808 (2009) 7

Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666 (1977) 10

Swift v. Tyson, 41 U.S. 1 (1842) 13, 15

Taber v. Maine, 67 F.3d 1029 (2d Cir. 1995) 6, 13

Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978) 10

United States v. Brown, 348 U.S. 110 (1954) 14

United States v. R.R. Ret. Bd. v. Fritz, 449 U.S. 166 (1981) 11

CONSTITUTION, STATUTES AND RULES

U.S. Const. art. I, § 1 1

U.S. Const. art. III, § 1 ..... 1, 2

15 U.S.C. § 1 8

28 U.S.C. § 1254(a)(1) 1

28 U.S.C. § 1346(b)(1) 2, 5

28 U.S.C. § 2671 2

28 U.S.C. § 2680 ..... 2, 5, 8

Sup. Ct. R. 13.1 1

TABLE OF AUTHORITIES – Continued

Page

PETITIONS FOR CERTIORARI AND BRIEFS IN OPPOSITION

Brief for Resp. in Opposition to Pet. for Cert., *Matthew v. Dep't of Army*, No. 08-1451, 2009 WL 2419167 (filed Aug. 7, 2009) 7

Pet. for Cert., *Brown v. Roche*, No. 06-1051, 2007 WL 275945 (Jan. 29, 2007) 7

Pet. for Cert., *Costo v. United States*, No. 01-526, 2001 WL 34115679 (Sept. 26, 2001) 6

Pet. for Cert., *Lemp v. United States*, No. 05-701, 2005 WL 3258678 (Nov. 7, 2005) 7

Pet. for Cert., *Matreale v. N.J. Dep't of Military Affairs*, No. 07-535, 2007 WL 3129913 (Oct. 19, 2007) 7

Pet. for Cert., *Richards v. United States*, No. 99-731, 1999 WL 33632511 (Oct., 1999).....7

OTHER AUTHORITIES

The Federalist No. 47 (James Madison) 10

Jonathan Turley, *Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 Geo. Wash. L. Rev. 1 (Feb. 2003).....9

William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 Geo. L.J. 1361 (1988).....12

OPINIONS BELOW

The order of the Eleventh Circuit granting summary affirmance (App. 1-3) is unreported. The district court's judgment (App. 11) and its order dismissing petitioners' complaint with prejudice (App. 5-9) are unreported.

JURISDICTION

The court of appeals entered its order granting summary affirmance on April 8, 2009. (App 1.) On June 2, 2009, petitioners filed an application to extend the time to file a petition for a writ of certiorari from July 7, 2009 to August 21, 2009, and Justice Thomas granted this application. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a)(1). Petitioners are timely filing this petition for certiorari on or before August 21, 2009. *See* Sup. Ct. R. 13.1.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 1 of the United States Constitution provides in pertinent part: "All legislative Powers herein granted shall be vested in a Congress of the United States. . . ." Article III, Section 1 of the United States Constitution provides in pertinent part: "The judicial Power of the United States, shall be vested in one supreme Court, and in such

inferior Courts as the Congress may from time to time ordain and establish. . . ." Relevant provisions of 28 U.S.C. §§ 1346(b)(1), 2680 are set forth in the appendix. (App. 13-16.)

STATEMENT OF THE CASE

I. The FTCA and the *Feres* Doctrine

In 1946, Congress enacted the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b) and 2671 *et seq.* The FTCA waives federal sovereign immunity and imposes liability on the Government for injuries caused by the negligent conduct of any Government employee while acting within the scope of his or her employment if the Government, as private actor, would be liable under the law of the place where the conduct occurred. *Id.* § 1346(b)(1). The FTCA's waiver of immunity is subject to several legislative exceptions. *Id.* § 2680. Among them, Congress excepted "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." *Id.* § 2680(j) (App. 16). This is the only exception that mentions the armed services. *Id.* § 2680.

Shortly after the FTCA was enacted, the Court decided three consolidated cases in *Feres v. United States*, 340 U.S. 135 (1950). Two cases were for medical malpractice; the third, for a soldier's wrongful death in a barracks fire. *Id.* at 136-37. The Court created a judicial exception to the FTCA's

waiver of immunity; specifically, it held "that the Government is not liable under the [FTCA] for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Id.* at 146.

II. The Case Below

This case concerns allegations of medical malpractice by the Government's employees at the Naval Hospital Jacksonville that resulted in the death of Nathan Nicholas Hafterson ("Nathan"), an active-duty member of the U.S. Navy. (App. 1-2, 6.) Nathan's pre-existing injuries, as well as the alleged medical malpractice, were wholly unrelated to any combatant activities. (App. 6.) Upon admission to the hospital, Nathan was diagnosed with aspiration pneumonia and hypoglycemia. (App. 6.) Based on the advice of the hospital's doctors, Nathan was intubated under anesthesia. (App. 6.) Subsequently, Nathan developed symptoms consistent with malignant hypothermia, a sometimes life-threatening reaction to anesthetic agents. (App. 6.) The hospital failed to adequately manage Nathan's malignant hypothermia. (App. 6.) As a result, Nathan died. (App. 6.)

Petitioners are Nathan's parents and the personal representatives of his estate. (App. 5.) They sued the respondent, the Government, under the FTCA. (App. 1, 5.) Because, at the time of the alleged wrongdoing, Nathan was serving as a member of the armed services, petitioners conceded in the courts

below that they were barred from filing a claim under the FTCA in light of *Feres*. (App. 2, 5.) Petitioners ask this Court to overrule *Feres*.

REASONS FOR GRANTING THE WRIT

Feres is unjust; it discriminates against the members of the armed services who bravely serve and defend our country. And, more importantly, *Feres* directly contradicts the will of Congress, was wrongly decided, and has received widespread, almost universal, criticism. *Infra* Argument I. Besides being plainly wrong, *Feres* was an unconstitutional, judicial usurpation of legislative power, and the continued reliance on it by the courts violates the separation-of-powers doctrine. *Infra* Argument II. The fact that Congress has not acted to correct *Feres* should not preclude this Court from overruling it. *Infra* Argument III. For all these reasons, this Court should grant the writ of certiorari and reexamine *Feres*.

I. *Feres* was wrongly decided and has been widely criticized.

Justices Stevens and Scalia, along with former Justices Brennan and Marshall, have concluded that Feres was a "clearly wrong decision." *Johnson v. United States*, 481 U.S. 681, 703 (1987) (Scalia, J. dissenting) (joined by Brennan, Marshall, and Stevens, JJ.). This conclusion was correct because the

holding of *Feres* – that service members may not sue the Government for injuries incident to their service – violates the clear will of Congress, as expressed in the FTCA.

The FTCA, by its plain language, renders the Government liable "for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[2] 28 U.S.C. § 1346(b). "Read as it is written, this language renders the United States liable to *all* persons, including servicemen, injured by the negligence of Government employees." *Johnson*, 481 U.S. at 693 (Scalia, J. dissenting).

Other provisions of the FTCA set forth exceptions to this general rule of liability, but none of the exceptions precludes FTCA suits by service members for injuries incident to their military or naval service. *Id.*; *see generally* 28 U.S.C. § 2680. Indeed, one exception "excludes 'any claim arising out of the *combatant activities* of the military or naval forces, or the Coast Guard, *during time of war*,' § 2680(j) (emphasis added), demonstrating that Congress

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[2] This language is the same today as it was when *Feres* was decided.

specifically considered, and provided what it thought needful for, the special requirements of the military." *Johnson*, 481 U.S. at 693 (Scalia, J. dissenting). Thus, "[t]here was no proper basis for [the *Feres* court] to supplement – i.e., revise – that congressional disposition." *Id.*

The parties in *Johnson* did not ask this Court to overrule *Feres*. *Id.* at 703 (Scalia, J. dissenting). But we do, and we are not alone. Numerous federal judges and commentators have opined that *Feres* was wrongly decided and have urged the Court to overrule it. *See Matreale v. State Dep't of Military & VA*, 487 F.3d 150, 158-59 & n.6 (3d Cir. 2007) (Smith, J. concurring) (listing multiple cases criticizing *Feres* and urging the Court to reexamine *Feres*); Pet. for Cert., *Costo v. United States*, No. 01-526, 2001 WL 34115679, at *23-25 & nn.10-12 (Sept. 26, 2001) (same). The critics of *Feres* have included members of this Court. In addition to the four dissenting justices in *Johnson*, Justice Ginsburg, when she was a circuit judge, noted that *Feres*' "soundness" had been "questioned" and called it a "problematic" precedent. *Lombard v. United States*, 690 F.2d 215, 228-30 (D.C. Cir. 1982) (Ginsburg, J. concurring in part and dissenting in part). In a similar vein, Judge Calabresi has noted that *Feres*' "reading of the FTCA was exceedingly willful, and flew directly in the face of a relatively recent statute's language and legislative history." *Taber v. Maine*, 67 F.3d 1029, 1038 (2d Cir. 1995).

This widespread criticism of *Feres* weighs in favor of overruling it. *Cf. Pearson v. Callahan*, ___ U.S. ___, 129 S. Ct. 808, 817 (2009) (overruling prior precedent in part because of widespread criticism by federal judges and members of the Court); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 73 (1940) (overruling prior precedent of statutory construction in part because of the "widespread" criticism of the precedent). But, despite this criticism, this Court over the years has denied several petitions for certiorari asking the Court to reexamine *Feres*. Brief for Resp. in Opposition to Pet. for Cert., *Matthew v. Dep't of Army*, No. 08-1451, 2009 WL 2419167, at *10 (Aug. 7, 2009) (citing several petitions for certiorari requesting that the Court reexamine *Feres*); Pet. for Cert., *Matreale v. N.J. Dep't of Military Affairs*, No. 07-535, 2007 WL 3129913 (Oct. 19, 2007); Pet. for Cert., *Brown v. Roche*, No. 06-1051, 2007 WL 275945 (Jan. 29, 2007); Pet. for Cert., *Lemp v. United States*, No. 05-701, 2005 WL 3258678 (Nov. 7, 2005); Pet. for Cert., *Richards v. United States*, No. 99-731, 1999 WL 33632511 (Oct., 1999).

None of these petitions, however, have argued that *Feres* was unconstitutional. We do, *infra* Argument II, and, thus, this Court should grant certiorari and reexamine *Feres* notwithstanding principles of *stare decisis*, *infra* Argument III.

II. *Feres* is unconstitutional because it violates the separation-of-powers doctrine.

When it enacted the FTCA, Congress could have barred claims by service members that "arise out of or are in the course of activity incident to service." *Feres*, 340 U.S. at 146. Eighteen tort claims bills were introduced in Congress from 1925 to 1935, and all but two of these bills expressly barred suits by service members. *Id.* at 138-39. But when Congress finally enacted the FTCA in 1946, it did not include any provision prohibiting claims that "arise out of or are in the course of activity incident to service." Instead, it merely prohibited claims that "aris[e] out of the combatant activities" of the armed services during times of war. 28 U.S.C. § 2680(j).

Nevertheless, in *Feres*, this Court usurped legislative powers and engrafted into the FTCA the "incident to service" exception. This exception was not approved by Congress. This judicially created exception bars FTCA claims like the medical malpractice claim in this case. Clearly, such claims – being wholly unrelated to any combatant activity – are permitted under the version of the FTCA enacted by Congress.

Frequently (but not in this case), a statute enacted by Congress may contain language that is silent or ambiguous on a particular issue. For instance, the Sherman Antitrust Act merely prohibits every contract "in restraint of trade or commerce." 15 U.S.C. § 1. In enacting such statutes, Congress leaves a vacuum that courts must fill when they interpret

the statute. The "interpretation" of such statutes requires extensive judicial consideration and deliberation to implement the will of Congress. A mere difference of opinion on how to interpret a silent or ambiguous statute would not amount to an unconstitutional judicial usurpation of legislative power.

But the FTCA that Congress enacted was not silent or ambiguous on the issue of the Government's liability. The command from Congress was clear and concise; there was no vacuum to be filled by the courts. The *Feres* court simply disregarded the clear, inexorable command of Congress, and it substituted its own judgment for the judgment of Congress. As one commentator has noted, "*Feres* . . . stands as one of the most extreme examples of judicial activism in the history of the Supreme Court. Despite countervailing statutory language and a chorus of critics, the Court pursued its own vision of military necessity and imposed its own version of sovereign immunity." Jonathan Turley, *Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 Geo. Wash. L. Rev. 1, 89 (Feb. 2003).

Judge Ferguson of the Ninth Circuit has cogently explained why *Feres* was an unconstitutional, judicial usurpation of legislative power:

> When considering the *Feres* doctrine, . . . we are . . . dealing with . . . a judicial re-writing of an unambiguous and constitutional

statute. Even to the courts that have considered it, the *Feres* decision stands not for an interpretation of [a] statute but rather a "judicially created exception" to the FTCA. *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 674 (1977) (Marshal, J., dissenting). . . . This judicial re-writing runs against our basic separation of powers principles. . . . *See The Federalist No. 47* (James Madison) ("Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul, for the judge would then be the legislator") . . . ; *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985) ("Courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices"); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194-95 (1978) ("Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.")

. . . .

Feres presented neither ambiguity . . . nor legislative silence. Instead, *Feres* took a fairly small, clearly defined, legislatively-created classification and broadened it

> considerably. As the Supreme Court has noted repeatedly, this kind of classification "inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." *FCC v. Beach Commc'ns., Inc.*, 508 U.S. 307, 315-16 (1993) (quoting *United States v. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1981)). The result raises . . . separation of powers concerns and, I believe, violates our Constitution.

Costo v. United States, 248 F.3d 863, 870-72 (9th Cir. 2001) (Ferguson, J. dissenting).

When one branch of government has violated the separation-of-powers doctrine by unconstitutionally usurping power from another branch, this Court has intervened and prevented the usurpation of power. *See, e.g., Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276 (1991) (finding Congressional oversight committee effectively encroached on executive branch); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57-61, 86-87 (1982) (finding that the Bankruptcy Act of 1978 was invalid because, by enacting it, Congress encroached on the power of Article III courts); *see also I.N.S. v. Ventura*, 537 U.S. 12, 17 (2002) (stating that a court may not intrude upon the domain which has been exclusively entrusted to an administrative agency). Such intervention is necessary because "[l]iberty is always

at stake when one or more branches seek to transgress the separation of powers." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J. concurring).

The *Feres* court itself transgressed the separation of powers by usurping legislative power. And this unconstitutional transgression continues each and every time a courts relies on *Feres* to deny a service member's FTCA claim. This Court thus should intervene and correct its erroneous *Feres* decision.

III. This Court should reexamine and overrule *Feres*, notwithstanding principles of *stare decisis*.

This Court should reexamine and overrule *Feres*, notwithstanding the general reluctance under principles of *stare decisis* to overrule precedents construing a statute. *See generally* William N. Eskridge, Jr., Overruling Statutory Precedents, 76 Geo. L.J. 1361, 1365 (1988) (discussing *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405 (1932) (Brandeis, J. dissenting)[3]). *Stare decisis* is not a "universal inexorable command." *Burnet*, 285 U.S. at 405 (Brandeis, J.). Whether a precedent should be followed is "a question entirely within the discretion of the [C]ourt."

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[3] Justice Brandeis's dissent in *Burnet* is a seminal opinion on principles of *stare decisis* that is often cited by the modern Court. *See* Eskridge, *supra*, 1365; *see, e.g., John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 128 S. Ct. 750, 757 (2008).

Id. at 406. And where, as here, a precedent's construction of a statute is constitutionally problematic, this Court has not hesitated to overrule the precedent, no matter how old that precedent may be. *See Erie*, 304 U.S. at 71, 77-80 (Brandeis, J.).

In *Erie*, this Court overruled a nearly century-old precedent, *Swift v. Tyson*, 41 U.S. 1 (1842), because it had created a doctrine that was an "unconstitutional assumption of powers by the Courts of the United States" and that "invaded rights . . . reserved by the Constitution to the several states." 304 U.S. at 79-80. The *Swift* court did this by erroneously construing the Federal Judiciary Act of 1789. *Id.* at 72-73. The resulting *Swift* doctrine caused a century of "injustice and confusion;" *id.* at 77-78, specifically, *Swift* "introduced grave discrimination by noncitizens against [the] citizens [of a state]," *id.* at 74.

Similarly, here, the *Feres* court unconstitutionally assumed legislative powers and invaded the powers reserved under the Constitution for the Congress. *Supra* Argument II. And, like the *Swift* court, the *Feres* court unconstitutionally assumed these legislative powers by erroneously "interpreting" the FTCA. *Id.* Moreover, like the *Swift* doctrine, the *Feres* doctrine has resulted in confusion and injustice; specifically, the law has discriminated unfairly against service members and has resulted in unequal treatment of even those within the armed services. *See Taber*, 67 F.3d at 1039, 1044 (Calabresi, J.) (noting that *Feres* has resulted in an incoherent body

of case law that this Court has applied inconsistently); *Costo*, 248 F.3d at 872-76 (Ferguson, J. dissenting) (noting that *Feres*' "incident to service" standard is so ill-defined that it leads to "very unequal applications" of the doctrine even to those within the armed services).

Feres unjustly and unfairly treats military citizens differently, and more harshly, than it treats civilian citizens without any rational basis to justify the disparate treatment. For instance, suppose a service member and a civilian were treated by the exact same medical professional at the exact same military hospital for the exact same ailment and were injured in exactly the same way as a result of the exact same act of medical malpractice. Under *Feres*, the civilian – who has not volunteered to fight and die for our country – can sue for damages. *See United States v. Brown*, 348 U.S. 110, 112 (1954). On the other hand, the service member – who did volunteer to fight and die for our country – cannot sue for the exact same damages arising out of the identical circumstances. *See Feres*, 340 U.S. at 146. This is unjust.

Finally, Congress's failure to correct *Feres* for nearly sixty years should not preclude this Court from overruling it. *See James v. United States*, 366 U.S. 213, 220 (1961) (noting "the fact that Congress has remained silent or has re-enacted a statute which we have construed, or that congressional attempts to amend a rule announced by this Court have failed, does not necessarily debar us from re-examining and

correcting the Court's own errors"). Indeed, when this Court in *Erie* overruled the century-old *Swift* precedent, it did so after several unsuccessful attempts in Congress to enact bills that would have overruled *Swift*. 304 U.S. at 77-78 & nn.20-21. As Justice Scalia has explained, "one must ignore rudimentary principles of political science to draw any conclusions regarding [congressional] intent from the *failure* to enact legislation."[4] *Johnson v. Transp. Agency, Santa Clara County, Cal.*, 480 U.S. 616, 671-72 (1987) (Scalia, J. dissenting). And when a precedent's "interpretation" of a statute leads to "a disastrous misadventure in judicial policymaking" – as is the case with *Feres* – then this Court should overrule the precedent. *See Holder v. Hall*, 512 U.S. 874, 893 (1994) (Thomas, J. dissenting).

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[4] One cannot know whether the "congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice." *Johnson*, 480 U.S. at 671-72 (Scalia, J. dissenting).

CONCLUSION

Accordingly, for all the foregoing reasons, this Court should grant the writ of certiorari and reexamine *Feres*.

Respectfully submitted,

BRYAN S. GOWDY
Counsel of Record
MILLS CREED & GOWDY, P.A.
865 May Street
Jacksonville, Florida 32204
(904) 350-0075
bgowdy@appellate-firm.com

SEAN B. CRONIN
CRONIN & MAXWELL
2223 Oak Street
Jacksonville, Florida 32204
(904) 388-9555
sean@croninmaxwell.com

Counsel for Petitioners

August 21, 2009

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-16857-AA

BARBARA HAFTERSON,
MATTHEW W. HAFTERSON,
as Personal Representatives of the Estate of
Nathan Nicholas Hafterson, deceased,

Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Florida

(Filed Apr. 8, 2009)

BEFORE: CARNES, HULL and WILSON, Circuit Judges.

BY THE COURT:

Appellee has moved this Court to summarily affirm the District Court's dismissal under *Feres v. U.S.*, 340 U.S. 135, 71 S.Ct. 153 (1950) of Appellants' Federal Tort Claim Act ("FTCA") claims for medical malpractice arising from the death of Nathan

Hafterson, who was an active-duty member of the United States Navy at the time of his death. Appellee correctly argues that this Court has previously determined that the *Feres* doctrine is binding on this Court, *McMahon v. Presidential Airways, Inc.* 502 F.3d 1331, 1341-42 (11th Cir. 2007), that the prior panel precedent rule makes that decision binding on this Court, and that this Court lacks the authority to overturn *Feres*.

In their response, as in their initial brief, Appellants concede that this Court must affirm the District Court in light of *Feres*. However, they ask this Court to issue a reasoned opinion urging that *Feres* be overturned. We decline to do so.

The former Fifth Circuit determined summary disposition of appeals is necessary and proper in two circumstances:

> The first comprises those cases where time is truly of the essence. This includes situations where important public policy issues are involved or those where rights delayed are rights denied. Second, are those in which the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case, or where, as is more frequently the case, the appeal is frivolous. Without canvassing all other possible or likely situations, we hold that where either of these

> circumstances is found, summary disposition is proper.

Groendyke Transport, Inc. v. Davis, 406 F.2d 1158, 1162 (5th Cir. 1969).[1]

It is clear that this appeal falls into the second category. In light of Appellants' concession that the *Feres* doctrine bars their claims, we GRANT Appellees' motion for summary affirmance. The Clerk is directed to close this appeal.

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[1] Pursuant to *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), published decisions of the former Fifth Circuit rendered prior to close of business on September 30, 1981 are binding on this Court.

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

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April 08, 2009

Sheryl L. Loesch
Clerk, U.S. District Court
300 N HOGAN ST STE 9-150
JACKSONVILLE FL 32202-4271

Appeal Number: 08-16857-AA
Case Style: Barbara Hafterson v. USA
District Court Number: 08-00533 CV-J-16-MCR

The enclosed certified copy of this Court's Order of Dismissal is issued as the mandate of this court. *See* 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "A motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Sincerely,

THOMAS K. KAHN, Clerk

Reply To: Shirley M. Brown
(404) 335-6170

Encl.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FLORIDA

BARBARA HAFTERSON and MATTHEW W. HAFTERSON, as personal representatives of the estate of NATHAN NICHOLAS HAFTERSON,

Plaintiffs,

Case No.: 3:08-cv-533-J-16MCR

v.

UNITED STATES OF AMERICA,

Defendant.
_____/

ORDER

(Filed Nov. 4, 2008)

BEFORE the Court is Defendant, the United States' Motion to Dismiss (Dkt. 5, the "Motion"). The United States is a party to this action pursuant to the Federal Tort Claims Act, 28 U.S.C. § 1346(b) and § 2671, *et seq.* (the "FTCA"). Although Plaintiffs, Matthew and Barbara Hafterson (collectively, the "Plaintiffs") oppose the Motion (Dkt. 9, the "Opposition"), they concede that it must be **GRANTED** based on the Supreme Court's holding in *Feres v. United States*, 340 U.S. 135 (1950) (holding that the FTCA did not waive sovereign immunity for claims brought by servicemen while on active duty). In the

Opposition, Plaintiffs claim that *Feres* was wrongly-decided and should be overturned. Plaintiffs also ask this Court to acknowledge that *Feres* was wrongly decided and urge that it be overturned in any Order it issues on the Motion. For the reasons that follow, the Motion (Dkt. 5) will be **GRANTED**.

I. Background

In summary, Plaintiffs filed this two-count medical malpractice case as personal representatives of their son Nathan Nicholas Hafterson ("Hafterson"). Hafterson, an active-duty member of the armed services, died at the Naval Hospital Jacksonville (the "Hospital") on March 27, 2006, one day after being admitted. Upon admission to the Hospital, Hafterson was initially diagnosed with aspiration pneumonia and hypoglycemia. Due to continued breathing difficulties following his admission to the Hospital, Hafterson consented to being intubated, having a breathing tube inserted in his airway, on the advice of the Hospital's doctors.

Following his intubation under anesthesia, Hafterson's condition deteriorated rapidly. Hafterson developed signs and symptoms consistent with malignant hyperthermia – an uncommon and sometimes life-threatening reaction to some anesthetic agents characterized by an extremely high fever, rapid heart rate and severe metabolic acidosis. The Hospital's attempts to manage Hafterson's malignant hypothermia failed and he died.

II. Discussion

As a preliminary matter, the Court notes that the Motion is at best perfunctory and at worst violates Local Rule 3.01(a). The Motion essentially consists of a citation to *Feres* without further discussion or application.

The Court now turns its attention to the appropriate dismissal standard for a *Feres* motion. In other suits barred by *Feres*, the grounds cited for dismissal have varied between dismissals under Fed. R. Civ. P. 12(b)(1), for lack of subject matter jurisdiction, and Fed. Rule Civ. P. 12(b)(6), for failure to state a claim. The latter dismissal is considered a dismissal on the merits, while the former is jurisdictional. Defendant filed the Motion under Fed. R. Civ. P. 12(b)(1), citing lack of subject matter jurisdiction as the basis for dismissal. Based on the Court's research of pertinent case law, *Feres* motions should be considered under a 12(b)(1) standard for dismissal.

The *Feres* Decision and its Impact on the FTCA

The FTCA is a waiver of the federal government's immunity for the torts of its employees under certain circumstances. The FTCA provides that the United States shall be "liable for injury or . . . death caused by the negligent or wrongful act or omission of any employee.r of the Government . . . under circumstances where the United States, if a private person, would be liable to the claimant." 28 U.S.C. § 1346(b).

In *Feres*, the Supreme Court considered the claims of three servicemen for recovery under the FTCA for injuries they sustained while on active duty. The Supreme Court dismissed the servicemen's claims stating that the "Government is not liable under the [FTCA] for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Feres*, 340 U.S. at 146. Initially, the Supreme Court justified its decision in *Feres* on four specific policy grounds. *See* USCIVAC § 2:49 (Torts Against Military Personnel; *Feres* Doctrine), discussing the four grounds.

Today, the rationale for the continued application of *Feres* has evolved. *Id.* Regardless of the specific rationale currently underpinning it, *Feres* operates as a judicially created exception to the waiver of sovereign immunity found in the FTCA and serves as a broad bar to most tort claims arising in the course of a soldier's duties, whether in peacetime or war-time, in combat or on base. *See e.g., McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331 (11th Cir. 2007). For example, courts have often applied the *Feres* doctrine to bar suits seeking to recover for the alleged malpractice of physicians and surgeons employed by the United States. *See e.g., Vallance v. United States*, 574 F.2d 1282 (5th Cir. 1978).

Courts throughout the United States have made clear that where the conduct complained of falls within one of the exceptions to the FTCA, the district court lacks subject matter jurisdiction and cannot

hear the case. A federal district court is under a mandatory duty to dismiss a suit over which it has no jurisdiction and cannot adjudicate the merits of the claim.

Here, Plaintiffs do not dispute that at the time of his death, Hafterson was serving his country as an active-duty member of the United States Navy. Plaintiffs also acknowledge that this Court and the Eleventh Circuit are bound by *Feres*. Plaintiffs add, however, that "the U.S. Supreme Court is not [bound], and it should overturn *Feres*. Plaintiffs then set out some of the academic and judicial bases supporting their position that *Feres* should be overturned. Despite Plaintiffs' well-reasoned opposition to courts continued application of the *Feres* doctrine, it is clear that this case cannot escape the doctrine's broad reach. Thus, the Court has no jurisdiction to hear this case and Plaintiffs are barred from proceeding.

III. Conclusion

For the reasons set forth above, it is **ORDERED** that the Motion (Dkt. 5) is **GRANTED WITH PREJUDICE**. The **CLERK is DIRECTED** to **CLOSE this CASE**.

DONE and ORDERED from Chambers in Jacksonville, Florida on this 4th day of November 2008.

/s/ John H. Moore II
JOHN H. MOORE II
United States District Judge

Copies to: Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

BARBARA HAFTERSON et., al.,

Plaintiff,

-vs-

Case No. 3:08-cv-533-J-16MCR

UNITED STATES OF AMERICA,

Defendant. /

JUDGMENT IN A CIVIL CASE

(Filed Dec. 3, 2008)

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that pursuant to the Court's Order entered November 4, 2008, this case is dismissed with prejudice.

Date: December 3, 2008

SHERYL L. LOESCH, CLERK

s/ Shannie Woolbright
By: Deputy Clerk

Copy to:

Counsel of Record
Unrepresented Parties

28 U.S.C. § 1346. United States as defendant

. . .

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

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28 U.S.C. § 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to –

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if –

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.

(d) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[**(g)** Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.